

1  
2  
3  
4  
**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF WASHINGTON**

5  
6  
7 KRISTEN STANTON-COLLEY,

No. 1:15-CV-03026-MKD

8 Plaintiff,

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

9 vs.

10 CAROLYN W. COLVIN,

ECF Nos. 12, 14

11 Acting Commissioner of Social Security,

12 Defendant.  
13

BEFORE THE COURT are the parties' cross-motions for summary

14 judgment. ECF Nos. 12, 14. The parties consented to proceed before a magistrate

15 judge. ECF No. 18. The Court, having reviewed the administrative record and the

16 parties' briefing, is fully informed. For the reasons discussed below, the Court

17 denies Plaintiff's motion (ECF No. 12) and grants Defendant's motion (ECF No.

18 14).

19

20 ORDER ~ 1

**JURISDICTION**

The Court has jurisdiction over this case pursuant to 42 U.S.C. § 1383(c)(3).

**STANDARD OF REVIEW**

A district court's review of a final decision of the Commissioner of Social Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is limited; the Commissioner's decision will be disturbed "only if it is not supported by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012). "Substantial evidence" means relevant evidence that "a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and citation omitted). Stated differently, substantial evidence equates to "more than a mere scintilla[.] but less than a preponderance." *Id.* (quotation and citation omitted). In determining whether the standard has been satisfied, a reviewing court must consider the entire record as a whole rather than searching for supporting evidence in isolation. *Id.*

In reviewing a denial of benefits, a district court may not substitute its judgment for that of the Commissioner. If the evidence in the record "is susceptible to more than one rational interpretation, [the court] must uphold the ALJ's findings if they are supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district

1 court “may not reverse an ALJ’s decision on account of an error that is harmless.”  
2 *Id.* An error is harmless “where it is inconsequential to the [ALJ’s] ultimate  
3 nondisability determination.” *Id.* at 1115 (quotation and citation omitted). The  
4 party appealing the ALJ’s decision generally bears the burden of establishing that  
5 it was harmed. *Shineski v. Sanders*, 556 U.S. 396, 409-410 (2009).

## 6           **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

7           A claimant must satisfy two conditions to be considered “disabled” within  
8 the meaning of the Social Security Act. First, the claimant must be “unable to  
9 engage in any substantial gainful activity by reason of any medically determinable  
10 physical or mental impairment which can be expected to result in death or which  
11 has lasted or can be expected to last for a continuous period of not less than twelve  
12 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be  
13 “of such severity that he is not only unable to do his previous work[,] but cannot,  
14 considering his age, education, and work experience, engage in any other kind of  
15 substantial gainful work which exists in the national economy.” *Id.*  
16 § 1382c(a)(3)(B).

17           The Commissioner has established a five-step sequential analysis to  
18 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §  
19 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
20 ORDER ~ 3

1 work activity. *Id.* § 416.920(a)(4)(i). If the claimant is engaged in “substantial  
2 gainful activity,” the Commissioner must find that the claimant is not disabled. *Id.*  
3 § 416.920(b).

4       If the claimant is not engaged in substantial gainful activities, the analysis  
5 proceeds to step two. At this step, the Commissioner considers the severity of the  
6 claimant’s impairment. *Id.* § 416.920(a)(4)(ii). If the claimant suffers from “any  
7 impairment or combination of impairments which significantly limits [his or her]  
8 physical or mental ability to do basic work activities,” the analysis proceeds to  
9 step three. *Id.* § 416.920(c). If the claimant’s impairment does not satisfy this  
10 severity threshold, however, the Commissioner must find that the claimant is not  
11 disabled. *Id.*

12       At step three, the Commissioner compares the claimant’s impairment to  
13 severe impairments recognized by the Commissioner to be so severe as to preclude  
14 a person from engaging in substantial gainful activity. *Id.* § 416.920(a)(4)(iii). If  
15 the impairment is as severe as, or more severe than, one of the enumerated  
16 impairments, the Commissioner must find the claimant disabled and award  
17 benefits. *Id.* § 416.920(d).

18       If the severity of the claimant’s impairment does not meet or exceed the  
19 severity of the enumerated impairments, the Commissioner must pause to assess  
20 ORDER ~ 4

1 the claimant's "residual functional capacity." Residual functional capacity  
2 ("RFC"), defined generally as the claimant's ability to perform physical and  
3 mental work activities on a sustained basis despite his or her limitations, *id.* §  
4 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

5 At step four, the Commissioner considers whether, in view of the claimant's  
6 RFC, the claimant is capable of performing work that he or she has performed in  
7 the past ("past relevant work"). *Id.* § 416.920(a)(4)(iv). If the claimant is capable  
8 of performing past relevant work, the Commissioner must find that the claimant is  
9 not disabled. *Id.* § 416.920(f). If the claimant is incapable of performing such  
10 work, the analysis proceeds to step five.

11 At step five, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing other work in the national economy.  
13 *Id.* § 416.920(a)(4)(v). In making this determination, the Commissioner must also  
14 consider vocational factors such as the claimant's age, education and past work  
15 experience. *Id.* If the claimant is capable of adjusting to other work, the  
16 Commissioner must find that the claimant is not disabled. *Id.* § 416.920(g)(1). If  
17 the claimant is not capable of adjusting to other work, analysis concludes with a  
18 finding that the claimant is disabled and is therefore entitled to benefits. *Id.*

19

20 ORDER ~ 5

The claimant bears the burden of proof at steps one through four above.

*Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir. 2010). If the analysis proceeds to step five, the burden shifts to the Commissioner to establish that (1) the claimant is capable of performing other work; and (2) such work “exists in significant numbers in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

## **ALJ'S FINDINGS**

8 Plaintiff applied for Title II Disability Insurance Benefits (DIB) on January  
9 28, 2012, alleging onset beginning June 10, 2011. Tr. 229. The application was  
10 denied initially, Tr. 109-118, and upon reconsideration, Tr. 119-130. Plaintiff  
11 appeared for a hearing before an administrative law judge (ALJ) on August 9,  
12 2013. Tr. 29-108. On November 25, 2013, the ALJ rendered a decision denying  
13 Plaintiff's claim. Tr. 11-28.

14 At step one, the ALJ found that Plaintiff had not engaged in substantial  
15 gainful activity since the alleged onset date. Tr. 16. At step two, the ALJ found  
16 Plaintiff suffers from the following severe impairments: strains, sprains and soft  
17 tissue injuries, diabetes mellitus, and peripheral neuropathy. Tr. 16. At step three,  
18 the ALJ found that Plaintiff does not have an impairment or combination of  
19 impairments that meets or medically equals a listed impairment. Tr. 18. The ALJ

20 | ORDER ~ 6

1 then concluded that the Plaintiff had the RFC to perform sedentary work, with  
2 additional limitations. Tr. 18-21. At step four, the ALJ found Plaintiff could  
3 perform her past relevant work prior to November 1, 2012. TR. 22. In the  
4 alternative, at step-five, the ALJ found that, considering Plaintiff's age, education,  
5 work experience, and RFC, there are jobs in significant numbers in the national  
6 economy that Plaintiff could perform, such as surveillance system monitor and  
7 election clerk. Tr. 24. On that basis, the ALJ concluded that Plaintiff was not  
8 disabled as defined in the Social Security Act. Tr. 24.

9 On January 16, 2015, the Appeals Council denied review, Tr. 1-6, making  
10 the ALJ's decision the Commissioner's final decision for purposes of judicial  
11 review. *See* 42 U.S.C. § 1383(c)(3); 20 C.F.R. §§ 416.1481, 422.210.

## ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying  
14 her disability benefits under Title II of the Social Security Act. ECF No. 12.  
15 Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly discredited Plaintiff's symptom claims;
2. Whether the ALJ properly weighed the medical opinion evidence;
3. Whether the ALJ's step-four finding is supported by substantial evidence; and

20 | ORDER ~ 7

4. Whether the ALJ's step-five finding is supported by substantial evidence?

## DISCUSSION

#### **A. Adverse Credibility Finding**

Plaintiff faults the ALJ for failing to provide specific findings with clear and convincing reasons for discrediting her symptom claims. ECF No. 12 at 12-15.

An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

16       Second, “[i]f the claimant meets the first test and there is no evidence of  
17 malingering, the ALJ can only reject the claimant’s testimony about the severity of  
18 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the  
19 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal

1 citations and quotations omitted). “General findings are insufficient; rather, the  
2 ALJ must identify what testimony is not credible and what evidence undermines  
3 the claimant’s complaints.” *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th  
4 Cir. 1995)); *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ  
5 must make a credibility determination with findings sufficiently specific to permit  
6 the court to conclude that the ALJ did not arbitrarily discredit claimant’s  
7 testimony.”). “The clear and convincing [evidence] standard is the most  
8 demanding required in Social Security cases.” *Garrison v. Colvin*, 759 F.3d 995,  
9 1015 (9th Cir. 2014) (quoting *Moore v. Comm’r of Soc. Sec. Admin.*, 278 F.3d  
10 920, 924 (9th Cir. 2002)).

11       In making an adverse credibility determination, the ALJ may consider, *inter*  
12 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the  
13 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s  
14 daily living activities; (4) the claimant’s work record; and (5) testimony from  
15 physicians or third parties concerning the nature, severity, and effect of the  
16 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

17       Here, the ALJ discounted Plaintiff’s statements about the intensity,  
18 persistence, and limiting effects of her symptoms because: (1) the medical  
19 evidence and observations of treatment providers did not support the severity of

1 her alleged functional limitations; (2) her daily activities are consistent with the  
2 demands of sedentary work; (3) her most recent job ended for reasons other than  
3 her alleged impairments; and (4) she made inconsistent statements regarding her  
4 limitations. Tr. 19-21. In her opening brief, Plaintiff objected to only the first two  
5 reasons the ALJ offered for discounting her testimony. This Court finds the ALJ  
6 provided several specific, clear, and convincing reasons for finding Plaintiff's  
7 statements concerning the intensity, persistence, and limiting effects of her  
8 symptoms "are not entirely credible." Tr. 19.

9       **1. Medical Evidence**

10       The ALJ found that the medical evidence in the record did not support  
11 Plaintiff's claims of functional limitations. "Contradiction with the medical record  
12 is a sufficient basis for rejecting claimant's subjective testimony." *Carmickle v.*  
13 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) (citing *Johnson v.*  
14 *Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)). The ALJ first noted that in April  
15 2012, Plaintiff told Dr. Pellicer that her back pain started in 2004 and that the  
16 following exacerbated her back pain: lifting more than 10 pounds, sitting for more  
17 than 30 minutes, standing for more than 10 minutes, or walking for more than ten  
18 minutes. Tr. 430-31. However, the ALJ then detailed how two physicians

19

20 ORDER ~ 10

1 evaluated Plaintiff, and both concluded that Plaintiff had fewer functional  
2 limitations than Plaintiff alleged. Tr. 119-130.

3       The ALJ next found that the objective imaging and clinical findings did not  
4 show evidence consistent with the presence of disabling impairments. Tr. 20.  
5 Subjective testimony cannot be rejected solely because it is not corroborated by  
6 objective medical findings, but medical evidence is a relevant factor in  
7 determining the severity of a claimant's impairments. *Rollins v. Massanari*, 261  
8 F.3d 853, 857 (9th Cir. 2001). The ALJ noted that although Plaintiff complained  
9 of chronic and disabling back pain, lumbar back x-rays in May 2012 were normal  
10 and thoracic spine x-rays in September 2012 were normal. Tr. 434, 465.  
11 Although Plaintiff complained of left arm and right shoulder pain, x-rays of her  
12 arm in November 2012 were normal and right shoulder x-rays in March 2013 were  
13 normal. Tr. 489, 499.

14       The ALJ further concluded that the medical record showed that Plaintiff had  
15 made inconsistent statements regarding the persistence and severity of her back  
16 pain. Tr. 20. *Thomas*, 278 F.3d at 958 (ALJ may consider inconsistencies in a  
17 claimant's testimony when assessing credibility). Plaintiff contended that she is  
18 unable to work due to her chronic, disabling back pain. Tr. 19. However, in  
19 March 2012, Plaintiff reported no back pain, Tr. 421, which was a marked contrast

1 to her presentation to a different treatment provider, where she reported constant  
2 back pain at a level of six or seven out of ten, Tr. 426. In other instances, Plaintiff  
3 reported to medical providers that she had no back pain. *See, e.g.*, Tr. 397, 416.

4 Plaintiff contends objective clinical evidence supports her disability claim,  
5 highlighting Dr. Pellicer's examination notes as objective clinical evidence.  
6 However, it is the ALJ's duty to resolve conflicts and ambiguity in the medical  
7 and non-medical evidence. *See Morgan v. Commissioner*, 169 F.3d 595, 599-600  
8 (9th Cir. 1999). It is not the role of the court to second-guess the ALJ. *Allen v.*  
9 *Heckler*, 749 F.2d 577, 580 (9th Cir. 1984). The court must uphold the ALJ's  
10 decision where the evidence is susceptible to more than one rational interpretation.  
11 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989).

12       **2. Daily Activities**

13       The ALJ found that Plaintiff engaged in daily activities that were consistent  
14 with sedentary work and that her daily activities were inconsistent with her  
15 subjective complaints. Tr. 20-21. A claimant's reported daily activities can form  
16 the basis for an adverse credibility determination if they consist of activities that  
17 contradict the claimant's "other testimony" or if those activities are transferable to  
18 a work setting. *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir. 2007); *see also Fair v.*  
19 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989) (daily activities may be grounds for an

1 adverse credibility finding “if a claimant is able to spend a substantial part of his  
2 day engaged in pursuits involving the performance of physical functions that are  
3 transferable to a work setting.”). First, the ALJ found that her daily activities  
4 included preparing meals, doing household chores, driving a car, shopping in  
5 stores for groceries, taking her kids to dancing and bowling, helping kids with  
6 homework and watching television, and concluded that these activities are  
7 consistent with sedentary work. Tr. 20-21. The ALJ recognized that Plaintiff  
8 reported she cannot vacuum or do yard work, which he concluded were activities  
9 not consistent with sedentary work. Tr. 20-21. Although Plaintiff alleged that her  
10 pain interfered with her ability to do these things, Plaintiff was able to perform all  
11 self-care activities and attend and watch her children’s activities. Tr. 21. The ALJ  
12 found that these activities indicate her symptoms are not as limiting as she alleged.  
13 Tr. 21. “While a claimant need not vegetate in a dark room in order to be eligible  
14 for benefits, the ALJ may discredit a claimant’s testimony when the claimant  
15 reports participation in everyday activities indicating capacities that are  
16 transferable to a work setting” or when activities “contradict claims of a totally  
17 debilitating impairment.” *Molina*, 674 F.3d at 1112-13 (internal quotation marks  
18 and citations omitted). The ALJ properly discounted the credibility of Plaintiff’s  
19 testimony.

20 ORDER ~ 13

1           **3. Plaintiff's Work History**

2           The ALJ discounted Plaintiff's testimony about the severity of her  
3 limitations because those limitations did not stop her from working or from  
4 looking for work. Plaintiff contested these issues for the first time in her Reply  
5 Brief. ECF No. 15 at 5. Since she did not raise these challenges in her opening  
6 brief, she waived this contention. *See Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d  
7 1219, 1226 n.7 (9th Cir. 2009).

8           Even considering Plaintiff's argument, the ALJ did not err. She contends  
9 her discharge from her last employment, rather than her quitting because of a  
10 disability, is an insufficient reason to discredit her. Here, Plaintiff was fired from  
11 her prior employment; she did not leave her employment because she was  
12 disabled. Tr. 58. At the time she applied for benefits, she stated she had stopped  
13 working "for other reasons" and described why she was fired. Tr. 223. In fact,  
14 five days after the alleged onset of disability, she reported an upcoming job  
15 interview. Tr. 397. The ALJ found her statement and actions discredit her claim  
16 that she became so disabled she could not work. Because the ALJ reasonably  
17 interpreted the evidence to suggest that Plaintiff stopped working for reasons other  
18 than her impairments, that work history is a valid reason to discount Plaintiff's  
19 credibility. *See Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (finding

1 that an ALJ properly discounted a claimant's credibility in light of, *inter alia*,  
2 evidence showing that claimant's job ended "because he was laid off, rather than  
3 because he was injured"). This was a specific, clear, and convincing reason to  
4 find Plaintiff not credible.

5 **4. Inconsistency in Plaintiff's Statements**

6 The ALJ discounted Plaintiff's claims about the severity of her limitations  
7 because of her inconsistent statements. Tr. 20-21. Plaintiff did not challenge this  
8 basis in her opening brief, thus, it is waived. *See Bray*, 554 F.3d at 1226 n.7.

9 Even considering Plaintiff's argument, the ALJ did not err. Plaintiff  
10 contends her application for unemployment benefits is not a clear and convincing  
11 reason for rejecting her subjective complaints about the severity of her disabilities.  
12 Receiving unemployment benefits may not disqualify her for DIB, but an ALJ may  
13 employ ordinary techniques of credibility evaluation, such as a claimant's  
14 inconsistent statements. *See Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir.  
15 2005). The representations Plaintiff made to obtain unemployment benefits  
16 contradicted her subjective complaints. To obtain unemployment benefits, she  
17 certified every week that she was ready, able, and willing to immediately accept  
18 any suitable work. *See Title 50, Rev. Code Wash. Chs. 50.06, 50.20, 50.22; Title*  
19 *192 Wash. Admin. Code.* These certifications, at the very least, contradict her

1 testimony about the alleged onset of her disability. These inconsistent statements  
2 are an appropriate basis to discount Plaintiff's subjective complaints. *See*  
3 *Copeland v. Bowen*, 861 F.2d 536, 542 (9th Cir. 1988) (affirming ALJ who  
4 discounted claimant's testimony based, in part, on his receipt of unemployment  
5 benefits).

6 In sum, despite Plaintiff's arguments to the contrary, the ALJ provided  
7 several specific, clear, and convincing reasons for rejecting Plaintiff's testimony.

8 **B. Medical Opinion Evidence**

9 Next, Plaintiff faults the ALJ for discounting the opinions of her treating  
10 physician, Flint Orr, M.D., and examining physician, Mary Pellicer, M.D. ECF  
11 No. 12 at 8-11.

12 There are three types of physicians: "(1) those who treat the claimant  
13 (treating physicians); (2) those who examine but do not treat the claimant  
14 (examining physicians); and (3) those who neither examine nor treat the claimant  
15 but who review the claimant's file (nonexamining or reviewing physicians)."

16 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).  
17 "Generally, a treating physician's opinion carries more weight than an examining  
18 physician's, and an examining physician's opinion carries more weight than a  
19 reviewing physician's." *Id.* at 1202. "In addition, the regulations give more

1 weight to opinions that are explained than to those that are not, and to the opinions  
2 of specialists concerning matters relating to their specialty over that of  
3 nonspecialists.” *Id.* (citations omitted).

4 If a treating or examining physician’s opinion is uncontradicted, an ALJ  
5 may reject it only by offering “clear and convincing reasons that are supported by  
6 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
7 “However, the ALJ need not accept the opinion of any physician, including a  
8 treating physician, if that opinion is brief, conclusory and inadequately supported  
9 by clinical findings.” *Bray*, 554 F.3d at 1228 (internal quotation marks and  
10 brackets omitted). “If a treating or examining doctor’s opinion is contradicted by  
11 another doctor’s opinion, an ALJ may only reject it by providing specific and  
12 legitimate reasons that are supported by substantial evidence.” *Bayliss*, 427 F.3d  
13 at 1216 (citing *Lester*, 81 F.3d at 830-31).

14 Contrary to Plaintiff’s contention, the ALJ properly rejected the opinions of  
15 Dr. Orr and Dr. Pellicer. Because their opinions were contradicted,<sup>1</sup> the ALJ was  
16

---

17 <sup>1</sup> Plaintiff contends the ALJ could reject Dr. Orr’s opinion on the ultimate issue of  
18 disability only with clear and convincing reasons, citing *Holohan*, 246 F.3d at  
19 1202-03 (9th Cir. 2001). But the standard enunciated in *Holohan* is limited to

1 required to identify specific and legitimate reasons for rejecting their opinions.

2 *Lester*, 81 F.3d at 830-31.

3       **1. Dr. Orr**

4       In December 2012, Dr. Orr completed a check-box questionnaire, indicating  
5 that Plaintiff can only occasionally use her hands for fingering, fine and gross  
6 manipulation, and handling, and that Plaintiff is not capable of any type of work  
7 on a reasonably continuous, sustained basis. Tr. 491. At the end of the  
8 questionnaire, Dr. Orr wrote the following: “The severity of hand pain and  
9 reported disuse and dropping items is why I consider her incapable. With  
10 treatment of diabetes, sleep apnea, [and] carpal tunnel syndrome[,] symptoms may  
11 improve significantly.” Tr. at 492.

12       As an initial matter, contrary to Plaintiff’s contention, the ALJ incorporated  
13 Dr. Orr’s assessment of Plaintiff’s fingering and handling limitations into the  
14 RFC; he limited Plaintiff to occasional fingering and handling after November  
15 2012. Tr. 18. But the ALJ rejected Dr. Orr’s opinion that Plaintiff was not  
16 capable of performing any work for several reasons.

17 \_\_\_\_\_  
18 uncontradicted opinions. *Id.* Here, Dr. Cortijo contradicted Dr. Orr’s opinion  
19 when Dr. Cortijo concluded Plaintiff could work with some limitations. Tr. 124.

20 ORDER ~ 18

1       First, the ALJ faulted Dr. Orr's opinion because he did not cite objective  
2 clinical findings to support his conclusions and utilized only a check-box form.  
3 Tr. 22. Opinions on a check-box form or report which do not contain significant  
4 explanation of the basis for the conclusions may be accorded little or no weight.  
5 *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996). Moreover, an ALJ may  
6 discredit treating physicians' opinions that are conclusory, brief, and unsupported  
7 by the record as a whole or by objective medical findings. *Batson v. Comm'r, Soc.*  
8 *Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004); *see also* 20 C.F.R. §  
9 404.1527(c)(3) (an ALJ may afford less weight to an opinion that is unsupported  
10 by clinical findings). Here, the Dr. Orr relied on a check-box form and provided  
11 no objective clinical findings to support the opinion.

12       Second, the ALJ rejected Dr. Orr's opinion because it relied on Plaintiff's  
13 subjective complaints and reports of decreased functions. Tr. 22. The doctor in  
14 fact specifically noted his opinion was based on the Plaintiff's reporting of her  
15 pain and her subjectively perceived limitations. Tr. 492. A physician's opinion  
16 may be rejected if it is based on a claimant's subjective complaints which were  
17 properly discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001);  
18 *Morgan*, 169 F.3d at 602; *Fair*, 885 F.2d at 605. As discussed above, the ALJ  
19 properly discredited Plaintiff's symptom claims.

20 ORDER ~ 19

1       Third, the ALJ concluded that the objective treatment findings did not show  
2 that the Plaintiff's symptoms were as severe as Plaintiff claimed and did not  
3 establish the presence of debilitating symptoms. An ALJ may reject a physician's  
4 opinion that is unsupported by the record as a whole, or by objective medical  
5 findings. *Tonapetyan*, 242 F.3d at 1149; see also 20 C.F.R. § 404.1527(c)(4) (An  
6 ALJ may give less weight to a medical opinion that is inconsistent with the  
7 medical record as a whole). As the ALJ noted, diagnostic tests of Plaintiff's left  
8 arm, right shoulder, and lumbar and thoracic spine were normal. Tr. 16-17 (citing  
9 Tr. 434, 465, 489, 499). The physical examinations revealed some limitations,  
10 which the ALJ accounted for in the RFC. However, Plaintiff maintained a range  
11 of functional abilities, such as walking with a normal gait, standing without  
12 difficulty, exhibiting full strength in her legs, and having a full range of motion in  
13 her extremities. Tr. 379-80, 382, 407, 471, 503.

14       During some of Plaintiff's medical visits, she told her provider that she  
15 suffered "constant" pain. Tr. 426, 503. During other visits, including visits a  
16 month later, she reported no pain. Tr. 394, 397, 404, 417, 422. When she reported  
17 pain, doctors and physician assistants examined her feet, her back, her shoulders,  
18 and her hands; they referred her for blood and urine tests, x-rays, and MRIs. Tr.  
19 380, 392, 408-14, 417, 425-28, 446-51, 460, 462-65, 487-88, 499, 503, 509-11.

20 ORDER ~ 20

1 Dr. Flint Orr assessed her joint pain multiple times, and generally found “no  
2 real evidence” of inflammation or joint swelling. Tr. 460, 503. Upon examining  
3 Plaintiff’s foot, Dr. Orr concluded that she had no abnormalities to her feet, toe  
4 deformities, loss of sensation, foot ulcers, edema, decreased circulation, muscle  
5 weakness, or Charcot Foot, and concluded her foot was “normal.” Tr. 462. Dr.  
6 Orr ordered an MRI and multiple x-rays on Plaintiff’s shoulder, chest, and back.  
7 The radiologists who reviewed the MRI and x-rays found her “soft tissues were  
8 unremarkable.” Tr. 499. The radiologists diagnosed no bone or joint  
9 abnormalities, evidence of acute bony injury, evidence of degenerative changes of  
10 the lumbar spine or mid- or lower-thoracic spine. Tr. 417, 465, 488-89.  
11 Radiologists found Plaintiff’s spine in normal alignment, with spaces between  
12 discs preserved, and bony bodies and processes intact. Tr. 417, 434, 465, 488-89,  
13 499. The ALJ permissibly discredited Dr. Orr’s opinion based on the treatment  
14 findings in the record.

15 Fourth, the ALJ found that Dr. Orr’s opinion indicated that the limitations  
16 were temporary, not permanent. Tr. 22. On the form, Dr. Orr noted that he  
17 expected the symptoms to improve with treatment. Tr. 492. The ALJ found that  
18 statement consistent with Dr. Orr recommending Plaintiff for a six-month  
19 temporary (as opposed to permanent) disability parking pass (Tr. 498), indicating

1 he believed her impairments were not permanent. To be found disabled, a  
2 claimant must be unable to engage in any substantial gainful activity due to an  
3 impairment which “can be expected to result in death or which has lasted or can be  
4 expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §  
5 423(d)(1)(A); *see also Chaudhry v. Astrue*, 688 F.3d 661, 672 (9th Cir. 2012).  
6 From Dr. Orr’s statement indicating he expected her functioning to improve with  
7 treatment and decision to limit the parking permit to six months, the ALJ could  
8 reasonably infer that the duration requirement for a finding of disability is not met  
9 and reject Dr. Orr’s proposed limitations.

10 The ALJ provided specific and legitimate reasons for rejecting Dr. Orr’s  
11 opinion regarding Plaintiff’s limitations.

12 **2. Dr. Mary Pellicer, M.D.**

13 In April 2012, Dr. Pellicer examined Plaintiff. The ALJ gave significant  
14 weight to some of Dr. Pellicer’s conclusions regarding limitations, but did not  
15 credit the opinion that Plaintiff would need “more frequent breaks” to perform  
16 sitting, standing, and walking functions in the workplace or that Plaintiff was  
17 completely unable to bend, squat, crawl, and kneel. Tr. 21 (citing Tr. 431).

18 First, the ALJ discounted Dr. Mary Pellicer’s opinion because she did not  
19 provide support for the conclusions and her exam findings do not show how more

1 frequent breaks would improve Plaintiff's functioning. Tr. 21. A medical opinion  
2 may be rejected by the ALJ if it is conclusory, contains inconsistencies, or is  
3 inadequately supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278 F.3d at 957. The  
4 ALJ noted that Dr. Pellicer's exam findings did not suggest that Plaintiff would  
5 need "more frequent breaks," other than the "chronic back pain." Tr. 431. As the  
6 ALJ noted, this finding was based on Plaintiff's own self-report of pain, not based  
7 on the examination that Dr. Pellicer performed.

8 Second, the ALJ discounted the opinions because they were based on  
9 Plaintiff's subjective statements rather than objective examination findings. A  
10 physician's opinion may be rejected if it is based on a claimant's subjective  
11 complaints which were properly discounted. *Tonapetyan*, 242 F.3d at 1149;  
12 *Morgan*, 169 F.3d at 602; *Fair*, 885 F.2d at 605. Here, given Plaintiff's statements  
13 to Dr. Pellicer recounting her back pain (Tr. 426), it was reasonable for the ALJ to  
14 conclude that Dr. Pellicer's opinion regarding chronic back pain were based on  
15 Plaintiff's subjective complaints. As discussed above, the ALJ properly  
16 discredited Plaintiff's symptom claims.

17 Finally, the ALJ discredited Dr. Pellicer's opinion because Plaintiff's  
18 presentation during her examination with Dr. Pellicer was substantially different  
19 than that of other treatment providers. An ALJ may afford less weight to an

1 opinion that is inconsistent with the record as a whole. 20 C.F.R. §  
2 404.1527(c)(4). For instance, during Dr. Pellicer's exam, she observed that  
3 Plaintiff walked with a limp, had difficulty getting on and off the table, and  
4 appeared uncomfortable. Tr. 428. However, during other examinations, other  
5 treatment providers observed that Plaintiff walked with a normal gait, stood  
6 without difficulty, exhibited good weight bearing on both legs and a full range of  
7 motion in her extremities, and was not in acute distress. Tr. 379-80, 382, 407,  
8 471, 503.

9 While Dr. Pellicer noted Plaintiff's chronic back pain, treatment providers  
10 diagnosed no abnormality in her back. *Compare* Tr. 431 with Tr. 417, 434, 441,  
11 465, 488-89, 499. While Dr. Pellicer observed Plaintiff limp, Dr. Flint Orr  
12 examined her foot and found no abnormalities, loss of sensation, or muscle  
13 weakness. Tr. 462. While Dr. Pellicer observed Plaintiff experience difficulty  
14 getting on and off the exam table, other treatment providers observed Plaintiff  
15 walking with a normal gait, standing with no difficulty, and exhibiting good  
16 weight bearing on both legs. Tr. 379-80, 382, 407, 471, 503. While Dr. Pellicer  
17 concluded Plaintiff could not bend or squat, other providers observed Plaintiff  
18 exhibit full range of motion in her arms and legs. Tr. 379. The inconsistencies in  
19 the record as a whole constitute substantial evidence for discounting Dr. Pellicer's

1 opinion. *See, e.g., Valentine v. Cmm'r of Soc. Sec. Admin.*, 574 F.3d 685, 692-93  
2 (9th Cir. 2009) (affirming ALJ when presented with inconsistent medical record).

3 Even if the evidence was susceptible to more than one rational  
4 interpretation, this Court must uphold the ALJ's conclusion. *Morgan v. Comm'r,*  
5 *Soc. Sec. Admin.*, 169 F.3d at 599.

6 **C. Step Four Analysis**

7 Plaintiff contends the ALJ's step-four analysis is inadequate because he  
8 failed to take into account all of her limitations; to properly identify the specific  
9 demands of her past work; and to compare these specific demands with her  
10 specific functional limitations.

11 At step-four, a claimant has the burden of showing she can no longer  
12 perform past relevant work (PRW). 20 C.F.R. §§ 404.1520(e), 416.920(e).  
13 Although the burden of proof lies with the claimant, the ALJ has a duty to make  
14 the requisite factual findings to support his conclusion. SSR 82-62. This requires  
15 specific findings as to the claimant's RFC, the physical and mental demands of the  
16 PRW, and the relation of the residual functional capacity to the past work. SSR  
17 82-62.

18 As discussed above, the ALJ properly discredited the opinions Plaintiff  
19 alleges should have been included in the RFC. Accordingly, the ALJ need not  
20 ORDER ~ 25

1 incorporate those limitations in the RFC. *See, e.g., Osenbrock v. Apfel*, 240 F.3d  
2 1156, 1165 (9th Cir. 2001).

3       The ALJ failed to make any specific findings about the demands of her  
4 PRW, including customer service representative, *see* Tr. 22-23, which is error.  
5 However, the ALJ's error is harmless. It is harmless error for an ALJ to err at step  
6 four if substantial evidence supports the ALJ's alternative finding at step five. *See*  
7 *Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008).

8           **D. Step Five Analysis**

9       Finally, Plaintiff faults the ALJ for posing an incomplete hypothetical to the  
10 vocational expert. ECF No. 12 at 17-18. Specifically, Plaintiff contends that the  
11 ALJ erred by failing to include in her hypothetical various limitations that the ALJ  
12 rejected.

13       “An ALJ must propound a hypothetical to a [vocational expert] that is based  
14 on medical assumptions supported by substantial evidence in the record that  
15 reflects all the claimant’s limitations.” *Osenbrock*, 240 F.3d at 1165. “If the  
16 assumptions in the hypothetical are not supported by the record, the opinion of the  
17 vocational expert that claimant has a residual working capacity has no evidentiary  
18 value.” *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). “It is, however,  
19 proper for an ALJ to limit a hypothetical to those impairments that are supported

1 by substantial evidence in the record.” *Osenbrock*, 240 F.3d at 1165. Here, this  
2 Court finds the ALJ’s hypothetical included the full extent of Plaintiff’s limitations  
3 supported by substantial evidence in the record. Plaintiff cites to the opinions of  
4 Dr. Pellicer in support of her alleged limitation. However, as indicated above, the  
5 ALJ properly considered and rejected those opinions when formulating Plaintiff’s  
6 RFC. Accordingly, the ALJ need not have included such a limitation in the RFC.  
7 Because the ALJ included the full extent of credible limitations supported by the  
8 record in the hypothetical, this Court does not find error.

9 **IT IS ORDERED:**

10 1. Plaintiff’s Motion for Summary Judgment (ECF No. 12) is **DENIED**.

11 2. Defendant’s Motion for Summary Judgment (ECF No. 14) is

12 **GRANTED.**

13 The District Court Executive is directed to file this Order, enter **Judgment**  
14 **for Defendant**, provide copies to counsel, and **CLOSE** the file.

15 DATED this 29th day of March 2016.

16 s/ Mary K. Dimke

17 MARY K. DIMKE

18 UNITED STATES MAGISTRATE JUDGE